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Supreme Court, U.S.
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No. 04-47

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE UNITED STATES CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. Because the fair administration of punitive damages long has been a concern of the business community, the Chamber regularly files *amicus* briefs in punitive damages cases. It is the Chamber's experience that the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and clarified in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2002). The Chamber is of the view that the lower courts need additional guidance from this Court as to the proper application of the *BMW* guideposts and that the present case is an ideal vehicle for providing that guidance.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court no doubt intended its decision in *State Farm* to send a strong message to lower courts about the need to enforce the procedural and substantive limitations on punitive damages. Unfortunately, although courts by and large have paid heed to this Court's observation that punitive awards rarely should exceed a single-digit multiple of compensatory damages, few have taken to heart the Court's further pronouncements that the historical tradition of double, treble, and quadruple damages remedies is "instructive" and that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum.

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[1] All parties have consented to the filing of this brief and have sent letters to the Court to that effect. No counsel for any party to these proceedings authored this brief, in whole or in part. No other entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief.

The lower courts are systematically misapplying the first guidepost as well. In the absence of guidance from this Court, most reviewing courts have applied the standard of review used to test the sufficiency of evidence for a liability finding — taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high responsibility. This near universal tendency to assume that the jury has found the defendant's conduct to be highly reprehensible and then to defer to factual "findings" that the jury may never have made is impossible to square with the law/fact distinction the Court drew in *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001), and with the procedural due process concerns it expressed in *State Farm*.

Finally, the lower courts have invoked a variety of means for depriving the third guidepost of any meaningful constraining force — notwithstanding this Court's rejection of such evasions in *State Farm*.

The present case exemplifies the ways in which courts are routinely misapplying each guidepost. Accordingly, it is an ideal vehicle for providing the additional guidance that the lower courts so badly need.[2]

ARGUMENT

In *State Farm*, this Court expressed "concerns over the imprecise manner in which punitive damages systems are administered," reiterated its admonition that "punitive damages pose an acute danger of arbitrary deprivation of property," and made clear that reviewing courts must undertake

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[2] The Chamber also has recently filed an amicus brief in No. 04-116 urging the Court to review the Utah Supreme Court's decision on remand in *Campbell v. State Farm Mutual Automobile Insurance Co.*, 2004 WL 869188 (Apr. 23, 2004). Both cases are excellent vehicles for providing the lower courts with the guidance they evidently continue to need.

"[e]xacting appellate review" in order to ensure that punitive awards are "based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 417-418 (internal quotation marks and alterations omitted). Regrettably, whether out of defiance or confusion, lower courts have been routinely misapplying (and, in some instances, outright ignoring) the guidance provided in *State Farm*. Review is necessary to close up the loopholes that the Arkansas Supreme Court and other lower courts have been punching in *State Farm*.

A. The Lower Courts Are Systematically Misapplying The Ratio Guidepost.

In *State Farm*, this Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). Applying these guidelines to the facts of the case before it, the Court observed that, even though the defendant's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-420), "a punitive award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

In the aftermath of *State Farm*, most lower courts have taken to heart the Court's admonition that double-digit (or higher) ratios will rarely be constitutional. At the same time,

however, many courts have assumed that single-digit ratios are immune from constitutional scrutiny, ignoring both this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive" and its admonition that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum.

The present case, in which the Arkansas Supreme Court upheld a $25 million punitive award on top of a $5.1 million compensatory award, is illustrative. The court quoted this Court's statement that "'[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, * * *, or, * * * of 145 to 1.'" Pet. App. 33a (quoting *State Farm*, 538 U.S. at 425). But despite the large compensatory award, the court made no mention of *State Farm*'s clearly pertinent admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial.[3]

This is not the only occasion on which the Arkansas Supreme Court has been unfaithful to the guidance this Court supplied in *State Farm*. In a prior case involving negligence on the part of a nursing home, that court approved a $21 million punitive award on top of compensatory damages of $5 million. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361, 363 (Ark.), cert. denied, 124 S. Ct. 535 (2003). There again, the

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[3] The $5.1 million compensatory award was "substantial" by any objective measure and indisputably constituted complete compensation for respondents' injuries. Although the award was not broken down into economic and non-economic components, respondents had alleged that their economic damages equaled "a little over $2,600,000." Tr. at 6579; see also Tr. at 6286-87, 6297-98, 6374. Accordingly, this Court may fairly assume that the jury awarded $2.6 million in compensatory damages for economic injuries and the balance for non-economic injuries. Cf. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7 n.2 (1991) (assuming that the jury awarded the full amount of compensatory damages requested, for purposes of determining the portion of a general verdict that constituted punitive damages).

court focused exclusively on this Court's references to single-digit and 4:1 ratios with nary a nod to the Court's discussion of the 1:1 ratio.

Nor is the Arkansas Supreme Court alone in failing to pay full heed to the guidance this Court provided in *State Farm*. For example, in one of the first post-*State Farm* decisions, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), cert. dism'd, 124 S. Ct. 1168 (2004). Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

In another case alleging employment discrimination, the Ninth Circuit upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), cert. denied, 124 S. Ct. 1602 (2004). Focusing solely on the Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit stated: "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044.

Similarly, in a business tort case, the Federal Circuit held that *State Farm* did not require it to reduce a $50 million punitive award that was more than three times the compensa-

tory damages. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), cert. denied, 124 S. Ct. 1423 (2004). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is so necessary. Focusing entirely on the Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of more than 4:1 may be close to the line — and ignoring entirely the Court's observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in the case before it) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

345 F.3d at 1372 (alterations in original; citation omitted).

More recently, the Utah Supreme Court — in the *State Farm* remand itself — came up with a new way to evade this Court's guidance on the ratio guidepost. Rather than ignoring entirely this Court's suggestion that a ratio of 1:1 might be the constitutional maximum in that case, the Utah court instead opted to engage in revisionist history, claiming that what this Court really meant in *State Farm* is that "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." *Campbell*, 2004 WL 869188, at *9. Because the Campbells' damages were emotional rather than economic, the court reasoned, a ratio in the upper single-digit

range, rather than the 1:1 ratio suggested by this Court, was justified. *Id.* at *9-*10.

The Ninth Circuit recently took a similarly defiant tack. Straining to uphold a $5 million punitive award that was 2.6 times the $1,920,849 compensatory award for past and future unpaid disability benefits and emotional distress, it flatly asserted that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004).

In short, whether by rewriting this Court's discussion of the ratio guidepost, engaging in a selective reading of it, or straightforwardly denying its significance, the lower courts have pretty much read out of the opinion the suggestion that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial. Indeed, of the 28 post-*State Farm* decisions released by state and federal appellate courts in which the compensatory award or potential harm has exceeded $200,000 (and thus could be said to be "substantial"), only once has a court construed *State Farm* to necessitate a reduction to a 1:1 ratio.

In that case, which involved racial harassment in the workplace, the Eighth Circuit held that a $6,063,750 punitive award that was just over ten times the compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process

> requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004) (citation omitted).

Aside from *Williams*, we are aware of no case in which an appellate court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below on federal excessiveness grounds. To the contrary, the overwhelming majority of courts — including other panels of the Eighth Circuit — have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (observing that "the compensatory damages award is substantial * * * and the punitive damages award is many times [the defendant's] net worth" and then going on to hold that, "[i]n these circumstances, the four-to-one ratio approved by the Supreme Court of Arkansas in *Sauer*, and by the U.S. Supreme Court in *Haslip*, becomes an appropriate due process maximum"); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 73 (Cal. Ct. App.) (stating that, "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'" and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million), review granted, 88 P.3d 497 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Williams v. Philip Morris Inc.*, 92 P.3d 126, 145 (Or. Ct. App. 2004) (concluding that, after "potential" harm to non-parties is considered, $79.5 million punitive award would "fall within *State Farm*'s 4-to-1 boundary"); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 674-76 (Or. Ct. App.) (focusing exclusively on

Court's references to single-digit and 4:1 ratios, stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. Ct. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm*'s statement on single-digit ratios, where compensatory damages were $300,000), appeal denied, 847 A.2d 1287 (Pa. 2004); *Harris v. Archer*, 134 S.W.3d 411, 438-39, 448 (Tex. Ct. App. 2004, pet. filed) (focusing exclusively on Court's references to single-digit and 4:1 ratios and reducing 7.4:1 ratio to 4:1, despite concluding that "lesser ratio" was warranted, where aggregate compensatory damages were $203,895); *Haggar Clothing Co. v. Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003, pet. filed) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000).[4]

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[4] See also, *e.g.*, *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 2004 WL 1907796, at *11 (8th Cir. Aug. 27, 2004) (reducing $18 million punitive verdict to $7 million in unfair competition case in which compensatory damages were $3.5 million); *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (upholding $10 million punitive award on ground that "the ratio of slightly more than 4.5:1 does not offend due process" — even while acknowledging that "Eden's compensatory damage recovery was significant and that this is a commercial case"); *Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"), cert. denied, 124 S. Ct. 2918 (2004); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (upholding punitive award that was 4.3 times non-compensable value of lost "benefit of the bargain" because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of constitutional impropriety,' but not presumptively unconstitutional"), review granted, 86 P.3d 881 (Cal. 2004); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm*, 538 U.S. at 425), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But their near universal focus on the Court's references to single-digit and 4:1 ratios — and near universal disregard of its statement that a 1:1 ratio may be the constitutional maxi-

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(Cal. Ct. App. 2003) (deeming a 3:1 ratio to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Maya B. v. Vogel*, 2004 WL 551325, at *13 (Cal. Ct. App. Mar. 22, 2004) (affirming ratio of 2:1 where compensatory damages were $790,000 in sexual assault case on ground that "single-digit multiplier was well within the discretion of the jury and trial court"); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensatory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (acknowledging that 10:1 ratio exceeded *State Farm*'s single-digit presumptive ceiling for due process, but concluding that ratio passed constitutional muster in light of defendant's reprehensible conduct (insurance bad faith), its significant wealth, and the "limited" $278,825 compensatory award); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867, 877 (S.C. Ct. App. 2004) (focusing exclusively on Court's references to single-digit and 4:1 ratios in concluding that aggregate ratio of 2.5:1 "comport[ed] with due process" where aggregate compensatory damages were over $1 million); *Trinity Evangelical Lutheran Church & Sch.–Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis.) (implicitly concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, 124 S. Ct. 925 (2003); cf. *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1075 (Utah 2003) (deeming federal excessiveness issue waived, but nonetheless upholding $5.5 million punitive award that was 5.5 times the compensatory damages as being "well within the single-digit ratio discussed by the Supreme Court in" *State Farm*), cert. denied, 124 S. Ct. 1716 (2004).

mum when compensatory damages are substantial — is much harder to comprehend. Further guidance is plainly needed.

B. The Lower Courts Are Systematically Misapplying The Reprehensibility Guidepost.

The present case also is an ideal vehicle for addressing a second critical issue that has confounded the lower courts — how the requirement of *de novo* review applies to the determination of the degree of reprehensibility of the defendant's conduct. This is a threshold question that arises in every case in which a reviewing court is tasked with evaluating an excessiveness challenge to a punitive award. And the answer to the question is very often determinative of the outcome of the excessiveness review. Accordingly, it is essential that the Court resolve the issue once and for all.

1. In *Cooper Industries*, the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts. 532 U.S. at 436. The Court reiterated that mandate in *State Farm*, observing that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 418 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts as to the meaning of "exacting" review in the context of determining whether the punishment is commensurate with the degree of reprehensibility of the conduct.

In the absence of guidance from this Court, most courts have applied the standard used to test the sufficiency of evidence for a liability finding. That standard entails taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high reprehensibility — rather than independently gauging the reprehensibility of the conduct.

The decision below is emblematic of this deferential approach. The Arkansas Supreme Court stated that, "'[w]hen punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees * * *.'" Pet. App. 29a (quoting *Advocat*, 111 S.W. 3d at 358). The court accordingly made no effort to determine for itself whether Union Pacific's conduct entailed the high degree of reprehensibility necessary to justify a $25 million punishment.[5] Indeed, as Justice Thornton noted in dissent, some of the "facts" upon which the Arkansas Supreme Court relied in its reprehensibility analysis had no basis at all in the underlying record. *Id.* at 41a-42a.

The Arkansas Supreme Court's refusal to engage in exacting scrutiny of the underlying facts and degree of reprehensibility of the punishable conduct is far from unique. See, *e.g.*, *Stogsdill*, 377 F.3d at 831 ("viewing the evidence in the light most favorable to the plaintiffs" as part of state and federal excessiveness review); *Hangarter*, 373 F.3d at 1014 (totality of court's reprehensibility analysis was statement that "[t]he evidence, *viewed in Hangarter's favor, can* support the conclusion that Defendants' conduct was [reprehensible]") (emphasis added); *Greenberg*, 2004 WL 74630, at *2 (totality of court's reprehensibility analysis was statement that "[t]he evidence of Paul Revere's repeated conduct * * * *was sufficient to allow the jury to find* such behavior reprehensible") (emphasis added); *Bogle*, 332 F.3d

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[5] The opinion is replete with instances in which the court pointed to the existence of evidence in the record supporting a possible "finding" rather than making an independent determination on the issue. See, *e.g.*, *id.* at 29a ("There is evidence that Union Pacific was on notice of the dangerous [condition of the crossing]."); *id.* at 30a ("Viewing the proof and all the evidence in the light most favorable to the Barbers, we conclude that Union Pacific knew, or should have known of the extreme danger presented to the public at [the crossing]."); *id.* ("There was also evidence to indicate a malicious intent perpetuated by Union Pacific."); *id.* 32a ("The record *also supports a finding* that Union Pacific manifested a reckless disregard for the health and safety of others.") (emphasis added).

at 1361 ("*A reasonable jury could have concluded from the evidence* that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race * * *.") (emphasis added); *Romo*, 6 Cal. Rptr. 3d at 806 & n.8 (rejecting argument that *State Farm* requires a court "either to reevaluate the evidence or to accept only 'the core facts of the case that the jury had to find in order to return a punitive damage verdict against the defendant'" and concluding that "*[s]ubstantial evidence supports the jury's implicit conclusion* that Ford acted with malicious conduct under aggravated circumstances") (emphasis deleted and added); *Diamond Woodworks*, 135 Cal. Rptr. 2d at 761 ("[W]e are compelled to observe that a jury did, in fact, determine Argonaut's conduct to be fraudulent and reprehensible and deserving of significant punitive damages. Neither the Constitution nor the *Campbell* court's interpretation of the due process clause requires us wholly to ignore the determination of the jury * * *."); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 574 (Or. Ct. App. 2003) ("[D]efendant fails to recognize that the jury decided the case in plaintiff's favor and that, as a result, *we must resolve all disputed facts in favor of plaintiff*.") (emphasis added).

2. The near universal tendency among lower courts to assume that the jury has found the defendant's conduct to be highly reprehensible and then to defer to factual "findings" the jury may not have made is impossible to square with this Court's precedents. In *BMW*, for example, an Alabama jury found that the defendant committed fraud and also found, by clear and convincing evidence, the prerequisite for imposition of punitive damages — that the fraud was "'gross, oppressive or malicious.'" *BMW*, 517 U.S. at 565 (quoting ALA. CODE § 6-11-20). Notwithstanding that jury finding, the Court independently evaluated the degree of reprehensi-

bility of the defendant's conduct, concluding that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. The Court emphasized that the jury's finding of the conduct necessary for punitive liability was entirely irrelevant to the excessiveness analysis, stating:

> We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

Id. at 579-580.

In *Cooper Industries*, the Court expressly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "*specific* findings of fact" by the jury (532 U.S. at 439 n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must decide for themselves whether the aggravating factors characteristic of highly reprehensible conduct are present. And in *State Farm*, the Court reiterated the importance of "[e]xacting appellate review" (538 U.S. at 418), giving no indication that this critical constitutional requirement can be satisfied by application of a sufficiency-of-the-evidence type standard.

3. To the contrary, absent specific factual findings that can be reviewed deferentially, a sufficiency-of-the-evidence standard is inconsistent both with the law/fact distinction the Court drew in *Cooper Industries* and with the procedural due process concerns it expressed in *State Farm*. That is because neither a jury's finding of the conduct necessary for punitive liability nor the amount of punitive damages the jury elects to

impose supplies any indication of its assessment of the *degree* of reprehensibility of the defendant's conduct. Indeed, the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. Upon reaching the punishment-setting stage, the jury generally is not instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions bearing on the degree of reprehensibility of the defendant's conduct. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish. In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations.

It follows that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard would result in deference being given to what are in reality phantom factual determinations, which in turn results in "false positive" determinations of high reprehensibility.

As the present case demonstrates, this concern is more than hypothetical. During the punitive stage of the trial, Union Pacific's net worth of $9.6 billion "was written on a board and displayed to the jury." Pet. App. 6a. It is simply impossible to tell from the fact that the jury returned a multi-million dollar punitive verdict whether the jury accepted every inference urged on it by respondents or instead believed that, in view of the substantiality of the defendant's financial resources, a $25 million dollar award constituted modest punishment for conduct of modest reprehensibility.

4. The difference between deferring to a jury's finding of punitive liability and conducting a true *de novo* review of the degree of reprehensibility of the defendant's conduct is readily apparent in this case. Any court undertaking such a review would have to conclude that Union Pacific's conduct did not come close to the level of reprehensibility necessary to support a $25 million punitive award (12½ times the amount this Court deemed in *BMW* to be "tantamount to a severe criminal penalty" (517 U.S. at 585)).

Important to the Arkansas Supreme Court's conclusion that "Union Pacific's conduct was indicative of a high degree of reprehensibility" was its belief that the evidence supported a finding that Union Pacific "manifested a reckless disregard for the health and safety of others" by "ignor[ing] the dangerous condition of a crossing in the face of constant complaints and near misses." Pet. App. 32a-33a. But as the majority conceded, there had not been any prior accidents at the crossing. *Id.* Plus, as Justice Thornton noted in dissent, Union Pacific had entered into a contract with another party "to clear the vegetation four months prior to the accident, specifically taking affirmative steps to remedy any vegetation problem at [the crossing], thereby demonstrating a lack of malice." *Id.* at 41a-42a. Union Pacific may well have been negligent in failing to ensure that its contractor was attending to the vegetation as diligently as necessary, but that failure of oversight is hardly indicative of high reprehensibility.[6]

In short, as this case well demonstrates, the difference between sufficiency-of-the-evidence review and exacting re-

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[6] The majority noted that "there was evidence that Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks." Pet. App. 32a. But there was no evidence that any such "prioritiz[ation]" was the cause of the accident, so even if that evidence is taken as true, the majority's reliance upon it clearly runs afoul of this Court's holding in *State Farm* that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory * * * business" (538 U.S. at 423).

view can be the difference between upholding an eight-digit punishment and concluding that "a more modest punishment * * * could have satisfied the State's legitimate objectives" (*State Farm*, 538 U.S. at 419-420). Because the Arkansas Supreme Court regrettably is not alone in diluting the constitutionally mandated exacting review by engaging in unwarranted deference to phantom factual findings, this Court should grant certiorari to clarify that, in the absence of specific jury findings, reviewing courts must determine for themselves whether the evidence establishes the existence of aggravating factors indicative of high reprehensibility.

C. The Lower Courts Are Continuing To Either Misapply Or Give Short Shrift To The Civil Fines Guidepost.

In *State Farm*, this Court admonished lower courts to compare the punitive damages with the legislatively established fine (if any) that is *realistic* under the circumstances, not to dwell on "the remote possibility of a criminal sanction" or to "speculate[]" about penalties, such as suspension of a business license, that are unrealistic under the facts of the case. 538 U.S. at 428. In so doing, the Court no doubt intended to lay to rest the kind of result-oriented application of the third guidepost that the Utah Supreme Court had perpetrated in that case. Unfortunately, that objective has not been accomplished. Courts bent on upholding multi-million dollar punitive awards continue to ignore or misapply this guidepost as if *State Farm* had never been decided.

In many situations, it may be appropriate to compare the punitive award to the maximum penalty that theoretically could be imposed. See, *e.g.*, *BMW*, 517 U.S. at 584 (comparing punitive award to $2,000 maximum civil penalty under Alabama Deceptive Trade Practices Act). But when that theoretical maximum bears no relationship to actual fining practice, invocation of theoretical maximums serves only to sanction punishments that violate *BMW*'s "fair notice" underpinnings. As the Eleventh Circuit has explained:

> If a statute provides for a range of penalties depending on the severity of the violation * * *, it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute. On the contrary, the extent of the defendant's statutory notice is related to the degree of reprehensibility of his conduct. * * * [C]onstitutionally adequate notice of potential punitive damage liability in a particular case depends on whether [the] defendant had reason to believe that his specific conduct could result in a particular damage award.

Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1337 (11th Cir. 1999) (emphasis in original); see also *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1149 (9th Cir. 2002) ("even assuming that as a general matter 'severe' awards might be appropriate in some cases, Leatherman has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a comparable case").

The decision below conflicts squarely with *Johansen* and *Leatherman*. Completely ignoring actual fining practice, the Arkansas Supreme Court held that the $25 million punitive award passed muster under the third guidepost because it was "comparable" to "the total civil penalties authorized by law," which it determined to be $10,082,500 by adding together the maximum daily state and federal fines for overgrown vegetation ($500 and $20,000 per day, respectively) and treating each day as a separate violation. That measure of the comparable fine, however, is wildly unrealistic. The *total* amount of fines collected by the Federal Railroad Administration from *all* railroads in America for *all* safety violations (excluding hazardous materials) for the year following the accident was only $4.3 million. See Federal Railroad Administration, Office of Chief Counsel, *Railroad Safety*

Civil Penalty Cases Closed During Fiscal Year 1999 (Jan. 31, 2000). The penalty that would realistically be imposed for overgrown vegetation at a single crossing was certainly much less, and far from the $25 million that the jury awarded. Union Pacific therefore lacked adequate warning of the severity of punishment that was imposed.

The Arkansas Supreme Court is far from alone in comparing the punitive award under review to speculative penalties that are unrealistic under the circumstances. For example, in an insurance bad faith case, the Ninth Circuit ignored the fact that the $2.4 million punitive award was 480 times the maximum civil fine for violating Arizona's proscription against unfair claims settlement practices, noting that "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere." *Greenberg*, 2004 WL 74630, at *2. See also *Myers v. Workmen's Auto Ins. Co.*, 2004 WL 1636753 (Idaho July 23, 2004) (comparing $300,000 punitive award against insurance company for failure to settle plaintiff's accident claim to loss of licensure under the Idaho Trade Practices and Frauds Act). The Seventh Circuit similarly speculated, in a case involving hotel guests who had been bitten by bedbugs, that the defendant hotel "would prefer to pay the punitive damages assessed in this case than to lose its license" due to "unsanitary conditions," which was theoretically authorized under municipal safety statutes. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 , 678 (7th Cir. 2003). And perhaps most egregious of all, in holding that a $4.5 *billion* punitive award was constitutionally permissible, a federal district court in Alaska ignored the fact that the actual fines paid by Exxon in connection with the grounding of the Exxon Valdez in Prince William Sound were $125 million on the ground that Exxon *could have been fined* $5.1 *billion* had it been convicted of five criminal offenses and made to pay "twice the gross pecuniary loss" for each of them. *In re*

Exxon Valdez, 296 F. Supp. 2d 1071, 107-1109 (D. Alaska 2004) (internal quotation marks and alterations omitted).

Many other courts have refused to give weight to the third guidepost, even when there is a readily available fine with which to compare the punitive award. See, *e.g.*, *Hangarter*, 373 F.3d at 1015 (upholding $5 million punitive award in insurance bad faith case without even acknowledging that fine for violation of California's unfair claim practices statute was $10,000); *Hollock*, 842 A.2d at 422 ($2.8 million punitive award was not "unjustified" in light of "potentially harsh penalties" that could be imposed on insurer for unfair claims handling — $5,000 per-violation fine and suspension of its license); *Trinity Evangelical*, 661 N.W.2d at 803 (refusing to give weight to Wisconsin's $10,000 penalty for unfair claim practices on ground that *State Farm* indicated that criminal penalties have "less utility").[7]

Review is badly needed to correct — once and for all — the pervasive refusal among the lower courts to apply the third guidepost in a principled fashion. In too many situations, including the present case, the third guidepost has ceased to perform its function as a constraining force.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The Utah Supreme Court took a different tack in the *State Farm* remand. Latching on to the fact that this Court appears to have "endorsed a punitive damages award of $1 million, which is one hundred times greater than the $10,000 fine" established by the Utah legislature for violations of Utah's Unfair Claims Practices Act, the court reasoned that a 100:1 ratio "does not offend due process." *Campbell*, 2004 WL 869188, at *10. It then leaped to the conclusion that a ratio of 902:1 between the punitive damages award and the maximum penalty would also comport with due process. *Ibid.* That bit of logical legerdemain not only drains the third guidepost of any constraining force, but also is affirmatively inconsistent with *BMW*, in which the Court concluded that a disparity of 1,000:1 was an indication that the punitive award at issue was grossly excessive. See 517 U.S. at 584.

Respectfully submitted.

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